

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

SHERMAR BARRY,

*Plaintiff,*

vs.

STATE OF NEVADA *ex rel.* DEPARTMENT  
OF CORRECTIONS, *et al.*

*Defendants.*

3:11-cv-00580-RCJ-RAM

ORDER

This removed *pro se* prisoner civil action by an inmate in the custody of the Nevada Department of Corrections (“NDOC”) comes before the Court for initial review of the complaint (#1-2) under 28 U.S.C. § 1915A.

The Court notes at the outset that the removing defendants state in the notice of removal that plaintiff filed a civil rights complaint in state court. The wholly handwritten complaint is designated only as a civil complaint and does not expressly invoke the federal civil rights laws. However, the Court proceeds on the premise that the well-pleaded allegations of the complaint present a federal question for purposes of jurisdiction.

When a “prisoner seeks redress from a governmental entity or officer or employee of a governmental entity,” the court must “identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

1 In considering whether the plaintiff has stated a claim upon which relief can be granted,  
 2 all material factual allegations in the complaint are accepted as true for purposes of initial  
 3 review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell*  
 4 *v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions  
 5 unsupported by any actual allegations of fact are not assumed to be true in reviewing the  
 6 complaint. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949-51 & 1954, 173 L.Ed.2d 868  
 7 (2009). That is, bare and conclusory assertions that constitute merely formulaic recitations  
 8 of the elements of a cause of action and that are devoid of further factual enhancement are  
 9 not accepted as true and do not state a claim for relief. *Id.*

10 Further, the factual allegations must state a plausible claim for relief, meaning that the  
 11 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

12 [A] complaint must contain sufficient factual matter,  
 13 accepted as true, to “state a claim to relief that is plausible on its  
 14 face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127  
 15 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial  
 16 plausibility when the plaintiff pleads factual content that allows the  
 17 court to draw the reasonable inference that the defendant is liable  
 18 for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The  
 19 plausibility standard is not akin to a “probability requirement,” but  
 20 it asks for more than a sheer possibility that a defendant has  
 21 acted unlawfully. *Ibid.* Where a complaint pleads facts that are  
 “merely consistent with” a defendant’s liability, it “stops short of  
 the line between possibility and plausibility of ‘entitlement to  
 relief.’ ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

... [W]here the well-pleaded facts do not permit the court  
 to infer more than the mere possibility of misconduct, the  
 complaint has alleged - but it has not “show[n]” - “that the pleader  
 is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

22 *Iqbal*, 129 S.Ct. at 1949-50.

23 Allegations of a *pro se* complainant are held to less stringent standards than formal  
 24 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30  
 25 L.Ed.2d 652 (1972).

26 In the present case, plaintiff Shermar Barry alleges interference or tampering with  
 27 and/or loss of his “J-Pay mail and regular mail” at Ely State Prison. He alleges that certain  
 28 defendants failed to properly investigate the alleged incidents regarding his mail, and he

1 alleges negligence in this regard. He alleges violations of state administrative regulations and  
2 the commission of a "federal offense" of tampering with his mail.

3 Plaintiff's allegations do not state a claim upon which relief may be granted under  
4 federal law. While alleged tampering with the mail may constitute a "federal offense," the  
5 federal criminal statutes prohibiting such interference with the mail do not give rise to a private  
6 cause of action. See, e.g., *Sciolino v. Marine Midland Bank-Western*, 463 F.Supp. 128, 131-  
7 34 (W.D.N.Y. 1979). Plaintiff otherwise has no federal constitutional claim under the Due  
8 Process Clause arising from the loss or destruction of the property consisting of his mail,  
9 because he may pursue a post-deprivation remedy for the property loss under state law. See  
10 *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Parratt v.*  
11 *Taylor*, 451 U.S. 527, 543, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other*  
12 *grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); N.R.S.  
13 73.010; N.R.S. 41.031; N.R.S. 209.243. Claims based on negligence further do not give rise  
14 to a federal constitutional claim. See, e.g., *Daniels*, 474 U.S. at 333, 106 S.Ct. at 666. Finally,  
15 any alleged violation of Nevada state regulations is a matter only of state law and does not  
16 give rise to a federal violation.

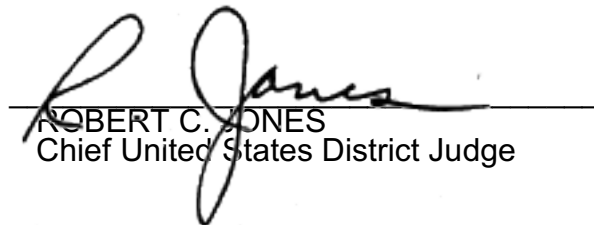
17 Any and all federal claims therefore will be dismissed for failure to state a claim upon  
18 which relief may be granted. The Court finds that allowance of leave to amend before  
19 dismissal of any and all federal claims would be futile.

20 Following upon the dismissal of any federal claims over which the district court  
21 otherwise might have original jurisdiction, the Court finds that the interests of judicial  
22 economy, convenience, fairness and comity would be best served in this case by remanding  
23 plaintiff's remaining state law claims. The Court accordingly exercises its discretion pursuant  
24 to 28 U.S.C. § 1367(c)(3) to decline to exercise supplemental jurisdiction over the state law  
25 claims (assuming federal jurisdiction in truth exists in the first instance) and remands the  
26 matter.

27 IT THEREFORE IS ORDERED that any and all federal law claims in the complaint are  
28 DISMISSED without prejudice for failure to state a claim upon which relief may be granted.

1 IT FURTHER IS ORDERED that this action shall be REMANDED to the Seventh  
2 Judicial District Court, State of Nevada, White Pine County, thereby closing the federal action,  
3 as the Court declines to exercise supplemental jurisdiction over any remaining state law  
4 claims.

5 DATED: September 8, 2011.

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9 ROBERT C. JONES  
Chief United States District Judge  
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